Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 75-944

In the
Supreme Court of the United States
OCTOBER TERM, 1975

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiffs-Respondents,

vs.

STANDERS WILLIAMS,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

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INDEX

PAGE

Opinion Below 1

Jurisdiction 1

Question Presented 1

Statement of the Case 2

Reasons for Granting the Writ 3

The decision below was based upon a misapprehension of the degree of error committed which cannot be regarded as harmless.

The decision below involves important procedural and substantive questions which should be reviewed by this Court.

Certificate of Service 7

Appendix:

A. Order of the Illinois Supreme Court 1a

B. Opinion of the Appellate Court of Illinois, Second District First Division 2a

Table Of Authorities

Cases:

Chase v. *State*, (Alaska) 369 P2d 997 6

Fields v. *State*, (Alaska) 487 P2d 831 6

Government of Virgin Islands v. *Hernandez*, (CA 3 VI) 476 F2d 791 6

People v. *Prim*, 53 Ill.2d 62, 289 NE2d 601 (1972) 4

State v. *Martin*, 297 Minn. 359, 211 NW2d 265 6

PAGE

U. S. v. *Brown,* 411 F2d 930 5

U. S. v. *Fioravanti,* (CA 3 NJ) 412 F2d 407, *cert den* 396 U.S. 837, 24 LEd 2d 88, 90 S Ct 97 5

U. S. v. *Williams,* (CA 5 Fla) 447 F2d 894 6

PUBLICATIONS:

"American Bar Association Standards for the Administration of Criminal Justice," Section 5.4 4

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Standers Williams respectfully prays that a Writ of Certiori issue to review the order of the Illinois Supreme Court entered September 23, 1975.

OPINION BELOW

The order of the Illinois Supreme Court was entered summarily without separate opinion of the Court. It is included herein as Appendix A. The opinion of the Appellate Court of Illinois, Second District, First Division is included herein as Appendix B.

JURISDICTION

The order of the Illinois Supreme Court was entered on September 23, 1975. The jurisdiction of the Court is invoked under Title 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a deadlock instruction of the "Allen" type may be given a jury before it has retired to deliberate.

STATEMENT OF THE CASE

Jeremiah Powell and Standers Williams, defendants herein, were indicted on May 21, 1973, along with Ervin Young, Henry Coleman, and John Lee. The first four counts of the indictment charged the offense of deviate sexual assault, alleging acts of anal and oral intercourse by force or threat of force against one Robert Frost on April 21, 1973. The last two counts charged the offense of aggravated battery against the same individuals on the same date.

The cause proceedd to a joint trial of defendants Jeremiah Powell and Standers Williams as well as Ervin Young on August 13, 1973. Upon motion of the State, the last two counts of the indictment charging aggravated battery were dismissed before trial.

The jury was given a deadlock instruction, or so-called "Allen" instruction along with the other instructions. The instruction was submitted as People's Instruction No. 17 as follows:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict. You are not partisans. You are judges — judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case."

After deliberations, the jury returned verdicts of guilty against Jeremiah Powell and Standers Williams and a finding of not guilty as to Ervin Young.

Subseqently, a hearing was held for the purpose of sentencing Williams. A pre-sentence investigation report showed Standers Williams to be nineteen years of age with one prior conviction for the offense of robbery. The court sentenced Standers Williams to a term of imprisonment of twelve (12) to thirty-six (36) years.

REASONS FOR GRANTING THE WRIT

The Appellate Court of Illinois, Second District, First Division, ruled that that court had had occasion to consider the issue of a so-called deadlock instruction where the instruction was given as part of the original series of instructions. The opinion of the Appellate Court recited that in cases of this kind, the Court had always considered this specific question where the *Allen* type instruction was given as a part of the original series of instructions, not containing a "heed the majority" admonition therein. The Court concluded that in these cases they had stated that where the evidence of guilt is overwhelming, the giving of the instruction did not constitute reversible error. The Appellate Court further found that this was the situation in the present case, and, thus, the Court likewise found that the giving of the Allen type instruction did not constitute reversible error.

The Supreme Court of Illinois denied leave to appeal, and thus the decision of the Appellate Court stands.

The decision of the Appellate Court was based upon a misapprehension of the degree of the error committed and may be characterized as a decision that the error below was harmless. This petition is founded upon the notion that the Allen type instruction, as given in the trial court below, cannot be regarded as harmless if there is a reasonable possibility that the instruction may have contributed to the petitioner's conviction in spite of any evidence introduced or not introduced. This sentiment was adopted by the Illinois Supreme Court itself upon adopting the American Bar Association's standard for the administration of criminal justice (Section 5.4) and saying:

> "We are of the belief that the adoption of the above quoted standards relating to jury trials will resolve the many questions created by the uncertainty attendant upon instructing a jury that is in disagreement. Under the supervising authority inherent in this court . . . we direct that hereafter the trial courts of this state when faced with deadlocked juries comply with the standards suggested by the A.B.A. minimum standards relating to jury trials above set forth."

People v. *Prim,* 53 Ill. 2d 62, 289 NE 2d 601, 609 (1972). Hence it is clear that the Illinois Supreme Court considered that an Allen type instruction be given by a trial court when "faced wtih deadlock juries." In the case at bar, the trial court did not submit this type of instruction in a deadlock situation, but, rather, gave the instruction with the rest of the instructions, even before the jury had retired. The harm done is clear: to emphasize concerns for unanimity among the jurors before they have

even deliberated together is to erode each juror's sense of individual self-reliance in decision making. The instruction itself places more heavy emphasis on this notion of joint decision in the opening paragraph. The first sentence in the second paragraph, again, leads with the duty of mutual consultation on the part of the jurors towards reaching an agreement. Some grudging deference is paid individualism then, but only as a consequence of plural deliberations. The contrasting of consesus with "doing violence to individual judgment" is particularly serious, as if anything less than violence to one's opinion would not amount to a reasonable doubt as to the guilt of the accused.

It is with good reason, then, that many high and well-respected Courts have looked with disapproval on these *Allen* type instructions. The Court of Appeals for the Seventh Circuit has urged the District Courts to discontinue them. *U.S.* v. *Brown,* 411 F2d 930.

The trial judges in the Third Circuit have also been directed not to give instructions either in the main body of a charge, or in a form of supplement that direct a juror to distrust his own judgment if he finds a large majority of jurors taking a view different from his. See *U.S.* v. *Fioravanti* (CA 3 NJ) 412 F2d 407, *cert den* 396 U.S. 837, 24 LEd 2d 88, 90 SCt 97, stating that the giving of such an instruction will be deemed error, normally reversible error, and cautioning that while conceivably, in very extraordinary circumstances, error may be found to be so inconsequential as to avoid the necessity of reversal on appeal, the court hereafter will not let a verdict stand that may have been influenced in any way by an *Allen* charge.

Elsewhere, an "Allen" type charge was considered so inherently coercive that its use could not be justified. *Fields* v. *State* (Alaska) 487 P2d 831, overruling *Chase* v. *State* (Alaska) 369 P2d 997. One Court has even gone so far as to hold that the use of an "Allen" charge, even as a supplemental instruction to deadlocked jurors, was improper per se. *State* v. *Martin*, 297 Minn. 359, 211 NW2d 265.

The strong contradiction among some courts as to practice in this respect leads the petitioner to submit that the matter is in great need of review. While some jurisdictions have apparently been untroubled by the question of deadlocked instructions, others have said that even where a jury had deliberated nearly six hours, the delivery of an "Allen" charge was improper; *U.S.* v. *Williams*, (CA5 Fla.) 447 F2d 894; and that the inclusion in jury instructions of coercive "Allen" charges was so improper as to require reversal. *Government of Virgin Islands* v. *Hernandez* (CA 3 VI) 476 F2d 791.

CONCLUSION

The rules and other guidelines for the instruction of deadlocked juries, and more importantly, the time when such deadlock instructions should be given, are most unclear if not violative of due process. The problem is so vexing, that it should be treated with great care and special attention regarding the rights of the accused, and not grouped with other harmless error doctrines. Thus, the giving of such a deadlock charge, as well as its timing, cannot be regarded as harmless, even in the face of overwhelming evidence, unless the court is able to

declare a belief that the error was harmless beyond a reasonable doubt. This is so, of course, because jurors, before retiring to deliberate, may have different views, even as to overwhelming evidence, and can not properly consider such evidence if their thoughts are a priori disturbed by coercive instructions urging unanimity when there has as yet been no divergent opinion expressed by any juror. Hence, it is improper to place the impact of instructions before the impact of evidence.

Important procedural and substantive questions are raised which should be settled by this Court. For these reasons, Petitioner requests that a Writ of Certiorari issue to review the decision of the Courts of Illinois.

Respectfully submitted,

LANCE HADDIX
Sute 720
33 North Dearborn Street
Chicago, Illinois 60602
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Lance Haddix, counsel for Petitioner, hereby certify that I have this 31st day of December, 1975, served three copies of the foregoing Petition for Writ of Certiorari upon William J. Scott, Attorney General for the State of Illinois, 160 North LaSalle Street, Chicago, Illinois, and Jack Hoogasian, State's Attorney for Lake County, Waukegan, Illinois, by depositing same, first class postage prepaid, in the United States mail chute at 33 North Dearborn Street, Chicago, Illinois. All Parties required to be served have been served.

LANCE HADDIX

APPENDIX A

(Letterhead of)
STATE OF ILLINOIS
OFFICE OF
CLERK OF THE SUPREME COURT
Springfield
62706

Clell L. Woods
Clerk

Telephone
Area Code 217
782-2035

September 23, 1975

Mr. Lance Haddix
Zeitlin and Schwab
Attorneys at Law
33 North Dearborn Street
Suite 720
Chicago, Illinois 60602

In re: People State of Illinois, respondent, vs.
Standers Williams, petitioner. No. 47844

Dear Mr. Haddix:

The Supreme Court today made the following announcement concerning the above entitled cause:

The motion by petitioner for leave to file petition for leave to appeal instanter is denied.

Very truly yours,
/s/ Clell L. Woods
Clerk of the Supreme Court

CLW:jae
cc: Wm. J. Scott
Jack Hoogasian

APPENDIX B

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FIRST DIVISION

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

STANDERS WILLIAMS and JEREMIAH POWELL,
Defendants-Appellants.

Appeal from the 19th Judicial Circuit,
Lake County, Illinois.

MR. JUSTICE GUILD delivered the opinion of the court:

Defendants Standers Williams and Jeremiah Powell were jointly indicted with three other men for deviate sexual assault upon the complaining witness in the Lake County jail. The defendants Williams, Powell and Young were tried by a jury; Young was acquitted and the defendants Williams and Powell were convicted. Williams was sentenced to a term of 12-36 years and Powell was sentenced to serve 30-90 years in the State Penitentiary.

The defendants raise four grounds for reversal of the conviction, to-wit: they were not proven guilty beyond a reasonable doubt; the trial court erred in giving the *Allen* or "deadlock" instruction (*Allen* v. *United States* (1896), 164 U.S. 492, 41 L.Ed 528, 17 S.Ct. 154.) when he instructed the jury in the original instance; the defendants were prejudiced by alleged inflammatory closing remarks of the prosecuting attorney; and lastly, that the sentence imposed upon each defendant is excessive for the offense of deviate sexual assault.

Robert Frost, the complaining witness, 17 years of age, was committed to the Lake County jail on the 20th of

April, 1973. That evening he was approached by Jeremiah Powell, 33 years of age, and advised that a number of the prisoners in the same area with him were planning a "gang bang" and that only Powell could prevent it. Frost said he would fight them off. That same evening Frost was forced out of his bunk and compelled to go to the latrine where three or more of the other prisoners committed numerous acts of sodomy, per os and per anus, upon the victim. The complaining witness testified that the defendant Powell stated to him, "don't try to get transferred out of this cell because anywhere you go in this jail I wll get you." During the period of these sexual attacks the victim was variously beaten by the defendants herein and others. The next morning the victim's mother visited him in the jail and he advised her of what had occurred. He was taken from the jail to the hospital where the doctor in the emergency room found that he had red marks on the side of his neck, abrasions and contusions, black and blue marks on his chest and on his shoulder blade area, a contusion of his right upper lip, a broken tooth and tears in his rectum of about one-half to one inch in length. No useful purpose would be served by further describing the various acts committed upon the complaining witness.

The defendant Powell contends that he was not proven gulty beyond a reasonable doubt in that the record indicates that the victim was a willing participant. We do not agree. It is dfficult to see how the victim would be a willing participant where he had been beaten by several of the jail inmates in the course of their sexual activities. As indicated, the victim testified in substance as above. One of the jail inmates, who had been jointly indicted for deviate sexual conduct, testified on behalf of the State and substantally corroborated the victim's testimony. The victim was referred to by one of the attackers as being a "white honkey" as all of the participants in the sexual attack on ths man were black. The defendant argues, in support of his contention that the victim was a willing participant, that his failure to

make a complaint about the attack until the next morning when his mother visited him in the jail is indicative of the fact that he did not object to the attack. In view of the fact that the defendant Powell warned the victim that he would "get him," in view of the fact that the victim was confined to an area with all of the men who had attacked him, and in further view of the fact that he was beaten by several of his attackers, it is difficult to follow this reasoning and we do not do so. It is to be expressly noted that the defendant Powell did not testify or otherwise deny the offense but merely alleged, through counsel, that the victim was a willing participant. It is also to be noted that the defendant Powell is 33 years of age and the record indicates that he was rather powerfully bulit, weighing about 130 pounds and that the 17 year old victim weighed but approximately 120 pounds. In this court's opinion the evidence of defendant's guilt is overwhelming and we find that the defendant Powell was proven guilty beyond a reasonable doubt.

As indicated above, the defendant Young was found not guilty. The defendant Willams contends that the evdence against him was no greater than that against hs co-defendant Young and, therefore, his conviction should be reversed. In support of this contention he has cited *People* v. *Patterson* (1972), 52 Ill.2d 421, 288 N.E.2d 403. We have examined that case and find it inapplicable to the case before us. In *Patterson* defendant's testimony was corroborated by three other witnesses and the complainant's testimony was contradictory. That is not the situation in the instant case where the defendant, Standers Williams and defendant Jeremiah Powell did not testify. We find that the defendant Williams was proven guilty beyond a reasonable doubt.

The next contention of the defendants is that the court erred in giving the *Allen* type instruuction. This instruction was given by the court together with all the instructions at the close of the evidence. Defendants cite *People* v. *Prim* (1972), 53 Ill.2d 62, 289 N.E.2d 601.

Reference is made to the *Prim* case with a detailed discussion therein of the use of this instruction. It appears that the basic objection to the instruction is its coercive effect in singling out ths issue where the jury appears to be deadlocked. Another basic objection to the instruction is the "heed the majority" portion thereof. In the case before us the "heed the majority" provision was deleted by the court. Since *Prim* this court has had occasion to consider this issue where the instruction was given as part of the original series of instructions in *People* v. *Casner* (1974), 20 Ill.App.3d 107, 312 N.E.2d 709; *People* v. *Uribe* (1973), 13 Ill.App.3d 1027, 301 N.E.2d 492; and *People* v. *Iverson* (1973), 9 Ill.App.3d 706, 292 N.E.2d 908. In these cases we considered this specific question where the *Allen* type instruction was given as a part of the original series of instruction, not containing the "heed the majority" admonition therein. In all three of these cases we stated that where the evidence of guilt is overwhelming, the giving of the instruction did not constitute reversible error. Since we find that this is the situation in the present case, we likewise find that the giving of the *Allen* type instruction did not constitute reversible error.

The next contention of the defendants is that the closing argument of the prosecuting attorney was prejudicial. In his closing argument the prosecuting attorney referred to the actions of Jeremiah Powell as being animalistic. In *People* v. *Elder* (1962), 25 Ill.2d 612, 615, 186 N.E.2d 27, 29, the prosecuting attorney used exactly the same term in describing the actions of the defendant in a rape case. Commenting upon this the Supreme Court said:

> "These characterizations were supported by complaining witness's description of the rape and the accompanying deviate acts. No objections to the allegedly prejudicial argument were interposed in the trial court. We are of the opinion that the remarks were not of such a nature as to require a reversal of the conviction."

The courts have repeatedly stated that it is proper for the prosecutor in his closing remarks to reflect unfavorably upon the accused and, under certain circumstances, to even indulge in invective. *See People* v. *Halteman* (1937), 10 Ill.2d 74, 139 N.E.2d 286; *Crocker* v. *The People* (1904), 213 Ill. 287, 72 N.E. 743; *People* v. *Oparka* (1967), 85 Ill.App.2d 33, 228 N.E.2d 291; and *People* v. *Williams* (1962), 26 Ill. 2d 190, 186 N.E.2d 353. The defendant Williams also complains of the prosecutor describing the action of Standers Williams in taking the victim to the lavoratory where the acts were committed as follows:

> ". . . he walked with him as a guard to — as with a prisoner — walked wth him to the slaughter area . . . [and] . . . set him up . . . for the kill. . . ."

Objections to the above remarks were sustained by the court and one of the two references to the defendant as "animalistic" was stricken. Under the facts of this case, the closing remarks of the prosecutor do not constitute reversible error.

Counsel for the defendants contends that the sentences imposed are excessive. In the case of Standers Williams, at the time of the sexual assault he had been confined in the Lake County jail on a charge of armed robbery to which he pled guilty on July 23, 1973 and was sentenced to the penitentiary for 2-6 years prior to the instant trial. He was found guilty by the jury herein of the crime of deviate sexual assault on August 17, 1973. As to Jeremiah Powell, we find that in 1964 he was convicted of rape and was sentenced to 30-50 years. In that case his conviction was reversed and remanded for a new trial and in 1972 he subsequently pled guilty to the same charge and was sentenced to 12-25 years. Four months later, while on parole, he was arrested and committed to the Lake County jail for the offense of armed robbery and subsequently he committed the deviate sexual assault complained of herein. Defense counsel argues that there "is a high incidence of homosexual activity among

incarcerated persons, thus, the instant offense was one unique to a prison situation. . . ." This is a specious argument. To contenance or condone forcible deviate sexual acts upon a fellow prisoner is scarcely conducive to the orderly administration of justice. We do not deem the sentence imposed upon Jeremiah Powell or Standers Williams to be excessive. As the Supreme Court stated in *People* v. *Sprinkle* (1974), 56 Ill.2d 257, 264, 307 N.E.2d 161, 164-65:

> "The trial court is normally in a better position during the trial and hearing in aggravation and mitigation to make a sound determination as to the punishment to be imposed than are courts of review. [Citations.]"

Since the filing of the briefs herein the defendants have cited *People* v. *Carter* (1974), 19 Ill.App.3d 21, 311 N.E.2d 213 with relation to the contention that defendants were not proven guilty beyond a reasonable doubt. We find *Carter* to be inapplicable to the case before us. In *Carter* one of three brothers was allegedly killed by the defendant. The appellate court, in reversing, stated:

> "The entire testimony of the Garrett brothers was so replete with contradictions and inconsistencies that a conviction based upon such testimony cannot stand. . . .
>
> "In the case at bar, no plausible evidence was introduced by the State which would support a finding of guilty as to the defendant, Tony Carter." 19 Ill. App.3d at 23, 311 N.E.2d at 215.

As we have previously indicated, in this court's opinion the evidence of the guilt of defendants herein was overwhelming.

Since the filing of the briefs herein this court has rendered its decision in *People* v. *Powell* (1975) ..... Ill.App.3d ....., 327 N.E.2d 32, involving the same defendant Powell as in this case, wherein this court vacated

defendant's sentence and remanded the cause for resentencing due solely to the trial court's heavy reliance upon an eight year old psychiatric report in sentencing the defendant in that case. Subsequent to that conviction the defendant herein was tried and, while it may be true that the same psychiatric report was available to the trial court, no objection thereto was made at the trial herein. In the robbery case against Powell the admission of the psychiatric report was admitted over the "strenuous objection" of defense counsel. That is not the situation in the instant case. In the instant case no hearing in aggravation and mitigation was conducted and it is interesting to note that the trial court stated:

> There has been at no time any suggestion by the State, by the Defendant, nor has the Court observed any aberrations on the part of this man which might in any way have suggested something be mentally wrong with this gentleman. And the Court therefore is forced to the opinion that he just doesn't care. When the Court is faced with a person with that attitude and has committed the three crimes which the Court has referred to, the Court feels that society must be protected."

We do not feel that the trial court was influenced in any way by the "stale" psychiatric report as to the defendant in this case. The defendant was tried and convicted of rape, was released on parole and within four months was convicted of robbery, which conviction has been affirmed by this court. While incarcerated he committed the instant offense and was thereupon sentenced to 30-90 years as indicated above. Under these facts we feel that the sentence imposed upon the defendant was within the discretion of the trial court and was not excessive nor prompted by reliance upon the "stale" psychiatric report.

The judgment of the trial court is affirmed.

AFFIRMED.

SEIDENFELD, *P.J.*, and HALLETT, *J.*, concur.